



1 (“Lori Kabins Trust”) and Third-Party Defendant Mark B. Kabins (“Mark Kabins”)  
2 (collectively, “the Kabins Parties”). In the first Motion to Reconsider (ECF No. 338), the  
3 Kabins Parties request reconsideration of Magistrate Judge Johnston’s denial of their Motion to  
4 Disqualify Albert Massi, Ltd. (ECF No. 280) in his March 31, 2011, Order (ECF No. 334). The  
5 Kabins Parties filed a Supplement (ECF No. 379), to which Defendants/Counterclaimants/  
6 Cross-Claimants Benessere, LLC (“Benessere”), Cipriani, LLC (“Cipriani”), Gila Bend 384,  
7 LLC (“Gila Bend”), Buckeye 80 West Three, LLC (“Buckeye 80”), and Buckeye Canamex 77  
8 One, LLC (“Buckeye 77”) (collectively, “the Benessere Parties”) filed a Countermotion to  
9 Strike (ECF No. 403).

10 In the second Motion to Reconsider (ECF No. 351), they request reconsideration of Judge  
11 Johnston’s May 4, 2011, oral order (ECF No. 366) denying their oral motion asserting attorney-  
12 client privilege during the deposition of Mark Kabins. Third-Party Defendants James D. Main  
13 and Main Amundson & Associates, LLC (“the Main Parties”) filed a timely opposition to both  
14 motions, but the Kabins Parties filed a Reply only to their first Motion to Reconsider (ECF No.  
15 338).

16 Also pending is the Main Parties’ Counter-Motion for Attorney Fees (ECF No. 359) in  
17 relation to the second Motion to Reconsider (ECF No. 351).

18 Also pending before the Court is Plaintiffs/Third-Party Defendants Kabins Entities’  
19 Motion to Dismiss (ECF No. 355) the Second Amended Counterclaim (ECF No. 342) brought  
20 by the Benessere Parties.

21 And finally, Third-Party Defendant Mark Kabins has filed a Motion to Dismiss (ECF No.  
22 356) the Second Amended Third-Party Complaint (ECF No. 344) brought by the Benessere  
23 Parties.

## 24 **I. BACKGROUND**

25 On July 28, 2010, the Court addressed motions to dismiss parties’ counterclaims, cross

claims and the third-party complaint. (*See* Order, ECF No. 314.) The Court granted leave to amend, and the parties subsequently filed their amended pleadings. (*See id.*; Second Am. Countercl., ECF No. 342; Second Am. Cross-cl., ECF No. 343; Second Am. Third-Party Compl., ECF No. 344.) Of these three amended pleadings only two are before the Court, subject to motions to dismiss – the Second Amended Counterclaim (ECF No. 342); and the Second Amended Third-Party Complaint (ECF No. 344).

In the same Order, the Court also addressed a motion to vacate Judge Johnston’s order requiring Mark Kabins to attend a deposition, and affirmed Judge Johnston’s order. (Order, ECF No. 314.) The second Motion to Reconsider (ECF No. 351) currently before the Court relates to the deposition that was subsequently conducted under the supervision of Judge Johnston.

## **II. LEGAL STANDARD**

### **A. Motion for District Judge to Reconsider Order of Magistrate Judge**

“A district judge may reconsider any pretrial matter referred to a magistrate judge . . . , where it has been shown that the magistrate judge’s ruling is clearly erroneous or contrary to law.” D. Nev. R. IB 3-1(a); *see also* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(a). Pursuant to Local Rule IB 3-1(b), a “district judge may affirm, reverse, or modify, in whole or in part, the ruling made by the magistrate judge,” and “may also remand the same to the magistrate judge with instructions.” *See also* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(a).

### **B. Sanctions Pursuant to Federal Rule of Civil Procedure 30(d)(2)**

Federal Rule of Civil Procedure 30 governs depositions by oral examination, and provides that “[t]he court may impose an appropriate sanction – including the reasonable expenses and attorney’s fees incurred by any party – on a person who impedes, delays, or frustrates the fair examination of the deponent.” Fed. R. Civ. P. 30(d)(2).

### **C. Motion to Dismiss**

Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action

1 that fails to state a claim upon which relief can be granted. *See North Star Int'l. v. Arizona Corp.*  
2 *Comm'n.*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule  
3 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not  
4 give the defendant fair notice of a legally cognizable claim and the grounds on which it rests.  
5 *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint  
6 is sufficient to state a claim, the Court will take all material allegations as true and construe them  
7 in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th  
8 Cir. 1986).

9 The Court, however, is not required to accept as true allegations that are merely  
10 conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden*  
11 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action  
12 with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a violation  
13 is *plausible*, not just possible. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*,  
14 550 U.S. at 555) (emphasis added).

### 15 **III. DISCUSSION**

#### 16 **A. Motions to Reconsider Magistrate Judge Orders & Countermotion to Strike**

17 The Court has reviewed Judge Johnston's order (ECF No. 334) denying the Kabins  
18 Parties' Motion to Disqualify (ECF No. 280) Albert D. Massi Ltd. ("Massi"), and does not find  
19 that his ruling was clear error or contrary to law. Months after filing the Motion to Reconsider,  
20 the Kabins Parties filed a Supplemental Objection to Magistrate's Order Regarding  
21 Disqualification of Counsel (ECF No. 379) stating that they "[had] now become aware of  
22 additional evidence" supporting disqualification of Massi. This additional evidence was not  
23 before Judge Johnston when he ruled upon the motion, and therefore the Court does not find that  
24 this additional evidence supports granting the Objection or remanding the motion to Judge  
25 Johnston. Accordingly, the Court will affirm the ruling of Judge Johnston as to the Motion to

1 Disqualify Massi. Furthermore, the Court notes that Federal Rule of Civil Procedure 60  
2 provides for relief from a judgment or order upon a motion and just terms. If the parties believe  
3 that new evidence or any other reason justifies reconsideration of the Motion by the Magistrate  
4 Judge, the parties may file such a motion. Finally, because the Court did not rely on the  
5 Supplemental Objection in its ruling on the Motion to Reconsider, the Court will deny the  
6 Countermotion to Strike (ECF No. 403) as moot.

7 Likewise, the Court has reviewed Judge Johnston's ruling addressing the objections  
8 regarding attorney-client privilege and requiring Mark Kabins to answer questions during  
9 deposition, and finds that Judge Johnston's ruling was not clear error and was not contrary to  
10 law. For a review and discussion of the rules, requirements and standards of professionalism  
11 that counsel are expected to observe during depositions, the Court refers the parties to *Luangisa*  
12 *v. Interface Operations*, No. 2:11-cv-00951-RCJ-CWH, 2011 WL 6029880, 2011 U.S. Dist.  
13 LEXIS 139700 (D. Nev. Dec. 5, 2011).

#### 14 **B. Counter-Motion for Sanctions**

15 The Main Parties request that the Court impose sanctions on the Kabins Parties in the  
16 form of reasonable attorney fees and costs pursuant to Rule 30(d)(2), arguing that the objections  
17 posed by Mark Kabins' counsel were inappropriate and unsupported in law, and only served to  
18 frustrate the fair examination of Mark Kabins at the deposition. (Counter-Motion for Fees  
19 Pursuant to FRCP 30(d)(2), ECF No. 358.) Although the Court finds that the Counter-Motion is  
20 well taken, and that counsel for the Kabins Parties verges on impeding, delaying, or frustrating  
21 the fair examination of the deponent, the Court nevertheless declines to exercise its discretion to  
22 impose sanctions at this time. Should this issue arise again, the parties may re-file the motion  
23 for Judge Johnston's consideration.

#### 24 **C. Motion to Dismiss Second Amended Third-Party Complaint No. 344 (ECF 356)**

25 The Benessere Parties originally filed a Third-Party Complaint (ECF No. 177) against the

1 Kabins Parties and the Main Parties, which is now in its third version, i.e., the Second Amended  
2 Third-Party Complaint (“SATPC”) (ECF No. 344). In the Court’s July 2010 Order (ECF No.  
3 314), the Benessere Parties were given leave to amend four causes of action as to the Kabins  
4 Parties: (1) civil conspiracy; (2) declaratory relief; (3) breach of contract/agreement; and  
5 (4) breach of implied covenant of good faith and fair dealing.

6 ***1. Civil Conspiracy***

7 “An actionable civil conspiracy is a combination of two or more persons who, by some  
8 concerted action, intend to accomplish some unlawful objective for the purpose of harming  
9 another which results in damage.” *Collins v. Union Fed. Sav. & Loan Ass’n*, 662 P.2d 610, 622  
10 (Nev. 1983).

11 In the Court’s July 2010 Order, the Court dismissed this cause of action, with leave to  
12 amend, because no facts were alleged indicating damages flowing from the alleged unlawful  
13 conspiracy. The Court noted that “[i]t is entirely consistent with the [First Amended Third-Party  
14 Complaint] that any damage to [the Benessere Parties] (if any) occurred as a result of  
15 [Defendant Jeff Chain]’s alleged misappropriations before [Mark Kabins] was ever aware of  
16 Chain’s activities.” (Order, 10:6-8, ECF No. 314.) In the instant Motion to Dismiss (ECF No.  
17 356), Mark Kabins moves to dismiss this cause of action, arguing that the Benessere Parties  
18 have yet again failed to allege “non-speculative damages logically attributable to acts  
19 undertaken by the alleged conspiracy” and that the “[SATPC] reveals the utter absence of  
20 logical connection between any of the respective components of those allegations that would  
21 support a civil conspiracy cause of action against Counter-defendants.” (Motion to Dismiss  
22 SATPC, 2:19-20, 5:21-23, ECF No. 356.)

23 However, the Court disagrees with this argument. The SATPC alleges that as a result of  
24 a Secret Agreement between Mark Kabins and Chain, that Chain failed to “actively market the  
25 subject real properties that were owned by [the Benessere Parties],” which “resulted in monetary

1 losses to [the Benessere Parties], as the value of the subject real properties were declining in  
2 value during this time period due to market conditions.” (SATPC, 14:4-7, ECF No. 344.) The  
3 Benessere Parties allege that if Mark Kabins had not conspired with Chain, they would have  
4 learned of the unlawful conduct at an earlier date and would have been able to prevent Chain  
5 from further breaches and theft. (*Id.* at 14:12-16.) Finally, the Benessere Parties allege that they  
6 “lost the opportunity to market the subject real properties at a then higher market price.” (*Id.* at  
7 14:10-11.)

8 The Court finds that these allegations are sufficient to show that damages are plausible,  
9 and the rest of the Benessere Parties’ allegations relating to civil conspiracy are sufficient to  
10 state a claim as well. Accordingly, the Court will deny the motion as to this cause of action.

## 11 **2. Declaratory Relief**

12 In the Court’s July 2010 Order, the Court dismissed this cause of action, with leave to  
13 amend with respect to contractual duties. In the SATPC the Benessere Parties allege that “[a]s  
14 an alter ego of Kabins Entities, which entered into the respective Operation Agreements with  
15 [the Benessere Parties], [Mark Kabins], as well as Kabins Entities, and each of them, have  
16 contractual duties not to act in bad faith towards [the Benessere Parties].” (SATPC, 20:19-21.)  
17 Mark Kabins argues that the alter ego allegations are insufficient, however the Court has already  
18 noted that “[t]here is a question of fact as to alter ego, and the Court will not dismiss on this  
19 basis.” (Order, 9:21.) The Court finds that the SATPC adequately amends the cause of action  
20 for declaratory relief as to contractual duties, and will accordingly deny the motion to dismiss as  
21 to this cause of action.

## 22 **3. Breach of Contract/Agreement**

23 In the Court’s July 2010 Order, the Court dismissed this cause of action, with leave to  
24 amend, directing the Benessere Parties that “[t]he contract(s) to which the Kabins entities are  
25 alleged to be parties should be identified, as should the signatories to any such contract(s).” (*Id.*



at 12:17-19.) In the SATPC, the Benessere Parties allege that “[t]he respective Operating Agreements are contracts entered into between [Mark Kabins], as well as Kabins Entities, and each of them, one [sic] the one hand and [the Benessere Parties] on the other hand,” and that the Kabins Entities and Mark Kabins, “by agreeing to membership in each [of the Benessere Parties] and entering into the respective Operating Agreements, owed each [of the Benessere Parties] a contractual duty to act in good faith and in the best interests of [the Benessere Parties]. . . .” (SATPC, 23:1-4.) The Court finds that this is sufficient to state a cause of action for breach of contract/agreement as directed by the Court’s Order, and will accordingly deny the motion to dismiss as to this cause of action.

#### ***4. Breach of Implied Covenant of Good Faith and Fair Dealing***

As the Benessere Parties point out in their Response, Nevada law governing operating agreements for limited liability companies provides that “an operating agreement may not eliminate the implied contractual covenant of good faith and fair dealing.” NRS 86.286(5). By alleging the existence of a contract, (i.e., an operating agreement, between the Kabins Parties and the Benessere Parties), the Benessere Parties have sufficiently pleaded this cause of action. Accordingly, the motion to dismiss will be denied as to this cause of action.

#### **D. Motion to Dismiss Second Amended Counterclaim No. 342 (ECF No. 355)**

The Benessere Parties originally filed a Counterclaim against the Kabins Entities along with their Answer (ECF No. 173) to the Kabins Entities’ Complaint (ECF No. 1). Their Counterclaim is now in its third version, i.e., the Second Amended Counterclaim (“SACC”) (ECF No. 342). In the Court’s July 2010 Order (ECF No. 314), the Benessere Parties were given leave to amend three causes of action as to the Kabins Entities: (1) civil conspiracy; (2) breach of contract; and (3) breach of the implied covenant of good faith and fair dealing.

##### ***1. Civil Conspiracy***

In the Court’s July 2010 Order, the Court dismissed this cause of action, with leave to



1 amend, for the same reason as stated in the SATPC, for failure to adequately plead damages.  
2 (Order, 14:21-22.) As with the SATPC, in the SACC, the Benessere Parties allege that they  
3 “lost the opportunity to sell the subject real properties that were owned by [the Benessere  
4 Parties] at a then higher market price.” (SACC, 10:25-26, ECF No. 342.) Accordingly, and as  
5 with the SATPC, this is sufficient to state a claim, and the motion to dismiss will be denied as to  
6 this cause of action.

7 ***2. Breach of Contract and Breach of the Implied Covenant of Good Faith and***  
8 ***Fair Dealing***

9 As with the SATPC, in the Court’s July 2010 Order, the Court dismissed these causes of  
10 action, with leave to amend, because “[t]he Benessere Defendants must identify which Plaintiffs  
11 are alleged to have breached which agreements with which Defendants.” (Order, 15:16-17.) In  
12 the SACC, the Benessere Parties allege that “[t]he respective Operating Agreements are  
13 contracts entered into between [the Kabins Parties], one [sic] the one hand and [the Benessere  
14 Parties] on the other hand,” and that “[p]ursuant to the laws of the State of Nevada, by statute,  
15 the Operating Agreements contractual [sic] include an implied covenant of good faith and fair  
16 dealing.” (SACC, 12:6-9.) As described above, this is sufficient to state a claim under this cause  
17 of action and the motion to dismiss will accordingly be denied as to this cause of action.

18 **IV. CONCLUSION**

19 **IT IS HEREBY ORDERED** that the Motion for District Judge to Reconsider [334]  
20 Order (ECF No. 338) is hereby **DENIED**.

21 **IT IS FURTHER ORDERED** that the Countermotion to Strike (ECF No. 403) is hereby  
22 **DENIED** as moot.

23 **IT IS FURTHER ORDERED** that the Motion for District Judge to Reconsider Order by  
24 Magistrate Judge (ECF No. 351) is hereby **DENIED**.

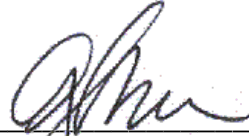
25 **IT IS FURTHER ORDERED** that Third-Party Defendants James D. Main and Main

1 Amundson & Associates, LLC's Counter-Motion for Attorney Fees Pursuant to FRCP 30(d)(2)  
2 (ECF No. 359) is hereby **DENIED**.

3 **IT IS FURTHER ORDERED** that Counterdefendants Kabins Family Limited  
4 Partnership's Motion to Dismiss Second Amended Counterclaim brought by Benessere, et al.  
5 (ECF No. 355) is hereby **DENIED**.

6 **IT IS FURTHER ORDERED** that Third-Party Defendant Mark Kabins, M.D.'s Motion  
7 to Dismiss Second Amended Third-Party Complaint brought by Benessere, LLC, et al. (ECF  
8 No. 356) is hereby **DENIED**.

9 DATED this 30th day of March, 2012.

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13 Gloria M. Navarro  
14 United States District Judge  
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